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Reflections on the Contributions of the International Criminal Tribunal for the Former Yugoslavia

Gabrielle Kirk McDonald

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Gabrielle Kirk McDonald

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Reflections on the Contributions of the International Criminal Tribunal for the Former Yugoslavia*

BY GABRIELLE KIRK McDONALD**

Introduction

Last year, one of the champions of the civil rights movement, Derrick Bell, delivered the Mathew O. Tobriner Memorial Lecture. In 1995, you heard from Richard Goldstone who served as the prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda. I have had the privilege of being associated with both of these eminent lawyers and I feel privileged today to join them in honoring Justice Tobriner, a distinguished and courageous jurist.

I began my career as a civil rights lawyer and it was my commitment to the rule of law as the mechanism to bring an end to institutionalized racism that took me to The Hague. For what are human rights but an international extension of civil rights? In his dissent in the *Bakke* case,¹ Justice Tobriner recognized that the legacy of two centuries of slavery and racial discrimination created a divided society that excluded African Americans from educational and economic opportunities that remained "largely the preserve of the

* This paper was presented as the 17th Annual Mathew O. Tobriner Memorial Lecture, Hastings College of the Law, September 18, 2000.

** Former President of the United Nations International Criminal Tribunal for the Former Yugoslavia at The Hague, Netherlands. The author was one of the Tribunal's original judges in 1993 and was elected President of the Tribunal in 1997. Prior to her tenure with the Tribunal, the author served as a United States District Judge for the Southern District of Texas. The author currently consults as special counsel to the chairman on human rights for Freeport-McMoRan Copper & Gold, Inc.

1. *Bakke v. Regents of the University of California*, 55 P.2d 1152 (Cal. 1976).

white-Anglo majority."² He found that affirmative action programs like the one used by the University of California "resulted in at least some degree of integration."³

In the former Yugoslavia, leaders and the media fanned the flames of ethnic and religious intolerance with devastating consequences. Although the judges at the Tribunal are presiding over criminal proceedings, the Tribunal's mandate is much broader; it is called upon to help bring about and maintain peace. One purpose of their judgments, therefore, is to create an inclusive society, one that was torn apart by intolerance and discrimination that also is very much a part of our country's experience. Justice Tobriner shared that vision of inclusiveness. Today at a luncheon at the Federal Building, Jerry Marcus, who Judge Thelton Henderson said keeps Justice Tobriner's memory alive, also shared some insights into this man's life.

Has anyone (other than me) noticed that as one gets older, time seems to pass more quickly? Seven short years ago I was eagerly anticipating joining the International Criminal Tribunal for the former Yugoslavia after my election by the General Assembly. I had read and re-read the Statute, drafted by the Secretary-General and adopted by the Security Council,⁴ which sets forth the framework for the Tribunal. I had also boned up on international humanitarian law. I realized that there would be little precedent for our work, yet that was what intrigued me. After my experience with the NAACP Legal Defense and Educational Fund where we worked to apply the newly enacted Civil Rights Act of 1964, I was looking forward to using the law creatively once again. As a former professor, I relished exploring new areas of the law. As a former judge in the United States, the chance to conduct trials in this new international forum was a once-in-a-lifetime opportunity. However, there is no way that I could have fully understood the extent of the institution-building that would be required. I also could not foresee the profound change the Tribunal's experience would bring about in international relations. Today I wish I could bring you with me on this exciting journey. But the best I can hope for is that by sharing my experiences, you will get a flavor of what it was like to be at the Tribunal. Therefore, I will review some

2. *Id.* at 1191 (Tobriner, J., dissenting).

3. *Id.*

4. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993) [hereinafter Resolution 827].

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of the events that made those six years go by so quickly. I will also reflect on the implications of the work of the Tribunal.

I. The Operation of the Tribunal

Although far from perfect, the Yugoslav Tribunal, or the ICTY, and its sister institution, the International Criminal Tribunal for Rwanda, or ICTR,⁵ have addressed the greatest gap in international humanitarian law: the failure to enforce the comprehensive legal regime enhanced after World War II which was designed to protect basic human rights during armed conflict.

Yet, when the judges first met in November 1993, the Tribunal was hardly equipped to meet this challenge; instead, at that time the Tribunal existed only as U.N. Security Council Resolution 827, which established it on May 25, 1993. Let me give you a short overview of the structure of the Tribunal.

The Statute, adopted by the Security Council, sets forth the framework for the Tribunal's operation. There are three organs: the Chambers, the Prosecutor and the Registry. The Chambers, initially comprised of two trial chambers of three judges each, was increased in 1998 to three trial chambers. Unlike the Nuremberg and Tokyo tribunals, there is an Appeals Chamber. It consists of five judges. The Appeals Chamber also hears appeals from the Rwanda Tribunal. The Yugoslav Tribunal is given competence to try persons for serious violations of international humanitarian law. It has subject matter jurisdiction over grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity.

The Tribunal is ad hoc, that is, it was established solely for the conflict in the former Yugoslavia. The trials are conducted by judges without a jury. The Statute directs the judges to adopt rules of procedure and evidence for the conduct of the proceedings and the protection of victims and witnesses. The Prosecutor is independent and responsible for initiating the investigation and submitting the indictment to a judge who determines whether a prima facie case has been established. The third organ, the Registry, is responsible for servicing both the Chambers and the Office of the Prosecutor. National courts have concurrent jurisdiction but the Tribunal,

5. The ICTR was formed by the Security Council to address violations of international humanitarian law in Rwanda during 1994. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994).

established by the Chapter Seven powers of the Security Council, has primacy, giving it the authority to request national courts to defer to the competence of the Tribunal.

The accused is guaranteed internationally recognized rights, including the presumption of innocence and the right to be tried in his presence. The maximum penalty that may be imposed by the Chamber is life imprisonment. If the accused is found to be guilty, he serves his sentence in a state that has agreed to accept convicted persons from the Tribunal. States are required to cooperate with the Tribunal, including the arrest or detention of persons. If a state fails to cooperate, the President may report this non-compliance to the Security Council for appropriate action.⁶

All of this was on paper; but in 1993, in reality, the judges were the Tribunal. The court had no premises, no rules and no one in custody. Moreover, the first Prosecutor selected decided he did not want the job after all and the U.N. could not agree on his replacement until nine months later; as a result, Richard Goldstone came on board some fifteen months after the Tribunal was established.

Despite these obstacles, the judges went to work in loaned space in the Peace Palace, where the International Court of Justice sits. Our first task was to draft the Rules. Over four months, we merged elements of common and civil law into 129 rules. Their application has produced the first comprehensive international code of criminal procedure. Being uniquely charged with providing rules for the protection of victims and witnesses and as the first judicial body specifically mandated to try crimes of sexual violence under international law, we developed significant measures to protect the identity of witnesses without infringing on the rights of the accused to a fair trial. This balancing of the rights of victims and the accused was an extraordinary challenge and a major accomplishment for a criminal judicial institution.

Even after adopting the rules and procedures for the Tribunal, it was still many months before any of us went near a courtroom,

6. See Resolution 827, *supra* note 4, ¶ 4; *Statute of the International Tribunal, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. SCOR, 48th Sess., Annex, art. 29, U.N. Doc. S/25704 (1993), available at <http://www.un.org/icty/basic/statut/statute.htm> (May 13, 1998) [hereinafter ICTY Statute]; *Rules of Procedure and Evidence, International Criminal Tribunal for the Former Yugoslavia*, rules 7bis, 11, 13, 59, 61, U.N. Doc. IT/32/Rev. 18 (2000), available at http://www.un.org/icty/basic/rpe/IT32_rev18con.htm (July 14, 2000).

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principally because none existed and there were no Prosecutors. However, by late 1994, the Office of the Prosecutor had a skeletal staff. Prosecution lawyers had reviewed evidence collected by the Commission of Experts, which had been created by the Security Council prior to the establishment of the Tribunal to investigate events in the former Yugoslavia.⁷ The Prosecutor also received sufficient supplementary information to present the first indictment, charging an alleged commander of a detention camp in eastern Bosnia and Herzegovina with war crimes and crimes against humanity. On November 4, 1994, Dragan Nikolic became the first person to be indicted by the Tribunal.⁸

However, it was not until early 1995, two years after its creation, that the Tribunal secured custody of an accused—Dusko Tadic. As the case proceeded to the courtroom, it also triggered the further development of the Tribunal's institutional structure: a detention unit to hold the accused, monitored by the ICRC; detention regulations; and an international legal aid system. Adding to this, by the end of 1995, the Tribunal had already made significant substantive contributions to international jurisprudence. Particularly notable are the Appeals Chamber findings in October 1995, made in response to Tadic's preliminary motion challenging the legality of the establishment of the Tribunal and its subject matter jurisdiction.⁹

The first full trial began on May 7, 1996. I was the presiding judge and the other two members of the Chamber were Ninian Stephen of Australia and Lal Chand Vohrah from Malaysia. The opening day was a real media event. Over 300 reporters were on hand. Two red tents served as their headquarters and almost made for a circus-like atmosphere. The public gallery, separated from the courtroom by a bulletproof floor-to-ceiling glass, was filled to its 150-seat capacity. After a few days, however, most of the press left. I am told that they were looking for more "blood and gore" than the

7. S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg., U.N. Doc. S/RES/780 (1992).

8. Prosecutor v. Nikolic, Indictment, No. IT-94-2 (ICTY Nov. 4, 1994) (amended Feb. 12, 1999), available at <http://www.un.org/icty/indictment/english/nik-ii941104e.htm>.

9. Prosecutor v. Tadic, Decision on the Defence Motion on Jurisdiction (Rule 73), No. IT-94-1 (ICTY Trial Chamber Aug. 10, 1995), available at <http://www.un.org/icty/tadic/trialc2/decision-e/100895.htm>; Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, No. IT-94-1 (Appeals Chamber Oct. 2, 1995), available at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>.

Prosecutor's case initially offered. The Prosecutor's case instead began with a professor who gave a detailed history lesson about the Balkans that consumed days of testimony. Thereafter, the trial went on for eighty-six days, spanning a six-month period, however, primarily because the single courtroom had to be shared for other proceedings. We heard from over 125 witnesses and admitted over 300 exhibits.¹⁰ Many important issues were raised and decided, which set the tone for the trials to follow. These issues included the handling of hearsay (it is admissible in the proceedings),¹¹ dealing with the conflicting interests of protecting witnesses from harm while preserving an accused's right to a fair trial¹² and handling the disclosure of documents between the parties.¹³

From a broader perspective, however, what is of signal importance is that the Tadic trial gave the Tribunal the first opportunity to apply the Rules—especially the rules of evidence—in a way that protected the accused's right to a fair trial, thereby demonstrating that international criminal justice was possible.

Notwithstanding this important milestone, the Tribunal continued to be bedeviled by the refusal of some states in the former Yugoslavia to cooperate with the Tribunal, a recalcitrance which continues to some extent to date. By way of example, while over seventy people had been indicted by mid-1997, only eight were in custody. States were reluctant to provide staff or funds, declined to order the 60,000 peacekeepers in Bosnia to assist what few investigators the Prosecutor had, and, it had been said, refused to provide it the intelligence information that would have allowed the investigation of those who instigated and directed the violence. The situation was so bad that Professor Ted Meron, one of the Tribunal's biggest supporters, suggested that the international community

10. See ICTY Trial Information Sheet: Tadic Case, No. IT-94-1 (Dec. 8, 2000), available at <http://www.un.org/icty/glance/tadic.htm>.

11. See Prosecutor v. Tadic, Decision on Defence Motion on Hearsay, No. IT-94-1 (ICTY Trial Chamber Aug. 5, 1996) (on file with ICTY).

12. See Prosecutor v. Tadic, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, No. IT-94-1 (ICTY Trial Chamber Aug. 10, 1995), available at <http://www.un.org/icty/tadic/trialc2/decision-e/100895pm.htm>.

13. See Prosecutor v. Tadic, Decision on the Prosecution Motion to Compel Disclosure of Statements Taken by the Defence of Witnesses Who Will Testify, No. IT-94-1 (ICTY Trial Chamber May 7, 1996) (on file with ICTY); Prosecutor v. Tadic, Decision on Prosecution Motion for Production of Defence Witness Statements, No. IT-94-1 (ICTY Trial Chamber Nov. 27, 1996), available at <http://www.un.org/icty/tadic/trialc2/decision-e/61127ws2.htm>.

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should support the court or shut it down.¹⁴

In these early years, the Tribunal was a victim of the tension between the perceived demands of peace and justice. The Tribunal's creation was simultaneously an act of hope, desperation and cynicism by an international community lacking a coherent policy to respond to the carnage inflicted in the former Yugoslavia. Its mandate was to help restore international peace and security, but the logical implication of this—the indictment and trial of the most senior officials considered to be the primary perpetrators—also was considered an unacceptable risk to the peace process.

In mid-1997, the Tribunal was given at long last the enforcement support it lacked. At that time, a small but influential group of states seemingly adopted a policy of what I have called collective activism by pushing for the arrest of indictees. The U.N. force in Croatia and then NATO in Bosnia began detaining indictees,¹⁵ and the United States assisted in securing the surrender of ten accused from Croatia. In the final six months of 1997, the population of the Tribunal's detention unit jumped from eight to twenty-two.

This period of unprecedented growth coincided with my election as President of the court in November 1997. The efforts of my predecessor, Antonio Cassese, were focused on ensuring the Tribunal's survival. During his term as President, there were few detainees and the infrastructure was being developed to function as a court of law. However, I was elected one month after ten Bosnian Croats surrendered.

The quickening pace of arrests and surrenders necessitated further rapid expansion. Over a five month period, I joined the ribbon-cutting ceremonies for two courtrooms and the three new judges I had requested shortly after I was elected President in an address to the Security Council came on board. The sudden increase in the number of accused and lawyers and, consequently, hearings, highlighted the need for more streamlined court processes. Since their original promulgation, the Rules had been amended as practice and circumstances revealed gaps but the complexity and legal novelty of the proceedings still resulted in long delays. Thus, in 1998, we

14. Theodor Meron, *Answering for War Crimes*, FOREIGN AFF. J., Jan. 1997, at 2.

15. This resulted from a combination of factors, including a change of government in the United Kingdom, the appointment of Madeleine Albright as the U.S. Secretary of State, the lack of progress in the peace process in the former Yugoslavia, and Prosecutor Arbour's use of secret indictments to reduce potential risks to NATO forces involved in detention actions.

began a systematic review of the Rules designed to assure that the trials were expeditious, recognizing the court's unique evidentiary and legal nature.

There was also a burgeoning of the Appeal Chamber's docket. The judges of the Tribunal Appeals Chamber also form the ICTR appellate court. Due to the low number of accused in custody and the narrow grounds of appeal,¹⁶ the first ICTY appeal was submitted in mid-1995¹⁷ and the ICTR Appeals Chamber was first called to consider a matter in mid-1998.¹⁸ By March 2000, however, the appellate judges had a docket of over forty ICTY and ICTR matters. This growth was fuelled by the addition of one trial chamber, which resulted in an increase in the proceedings being conducted, as well as the steady expansion of grounds of appeal. While this figure represents a normal, or even light, workload for a national court, it swamped the Tribunal.

The heavy workload was not limited to the Appeals Chamber; the trial judges were also overloaded. In part, this was because some trial judges temporarily were called upon to sit on appeals (and vice versa) as well.¹⁹ The complexity of the cases, both at the trial and appeals level, exacerbated the problem. Thus, in my final address to the General Assembly, I raised a concern that the Tribunal may not

16. The statutes permit appeals from either party on (i) an error of law invalidating the impugned decision, (ii) an error of fact that has occasioned a miscarriage of justice, or (iii) an application for review of a decision if new facts emerge which could have been a decisive factor in reaching the impugned decision. Rule 72(B) of the Tribunal's Rules of Procedure and Evidence allows an interlocutory appeal as of right from decisions on preliminary motions challenging jurisdiction and upon goodcause being shown. ICTY Statute, arts. 25, 26; *Statute of the International Tribunal for Rwanda*, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, arts. 24-25, U.N. Doc. S/RES/955 (1994), available at <http://www.icty.org/ENGLISH/basicdocs/statute.html>.

17. Prosecutor v. Tadic, Decision on Jurisdiction, *supra* note 9.

18. See Summary of Appeals Chamber Decision on Appeals Against the Decision of the Trial Chamber Rejecting the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witnesses "CC" and "E," (referencing Prosecutor v. Rutaganda, Notice of Appeal Against the Decision of Trial Chamber I Dismissing the Defence Motion for an Order to the Prosecutor to Investigate a Case of False Testimony (Witness "CC"), No. ICTR-96-3-A (Mar. 26, 1998)), available at <http://www.icty.org/ENGLISH/cases/Rutaganda/decisions/sum980608.htm>.

19. For example, Judge Shahabuddeen, Vice-President of the ICTY and member of the Appeals Chamber of the ICTY and ICTR, sat on Trial Chamber I conducting the trial of Tihomir Blaskic. Prosecutor v. Blaskic, Judgment, No. IT-95-14 (ICTY Trial Chamber Mar. 3, 2000), available at <http://www.un.org/icty/blaskic/trialc1/judgement/index.htm>.

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be able to provide the accused a fair and *expeditious* trial. I proposed that ad hoc (temporary) judges be appointed to help reduce the time an accused is held before his trial commences.²⁰

More recently, President Claude Jorda—the current president of the Tribunal—made a similar formal request to the Security Council. In addition to easing the burden on appellate judges, ad hoc judges would allow existing trial judges to focus exclusively on trials. In support of this, President Jorda presented the results of a Tribunal internal review, in which it was estimated that the Tribunal will not complete trial proceedings until 2016, with appeals to follow.²¹ Thus, without additional resources, an accused captured today could wait a considerable amount of time before the commencement of his trial.

In the United States, retired judges are often called upon to help with heavy dockets. Ad hoc judges could fulfil the same purpose for the Tribunal, hearing cases on an as-needed basis. Considering the extraordinary mandate of the Tribunal, the lack of precedent, the complexity of the cases, the Prosecutor's intention to bring more cases growing out of the Kosovo tragedy and most importantly, the accused's right to an expeditious trial, this request is warranted.

By 1998, a number of governments were complementing their newly proactive stance on arrests by their NATO troops with significant additional staff and funding. While obviously welcome, this generosity was limited to a handful of members of the international community. Not only was their largesse finite, but also the nature of the Tribunal required *all* states to cooperate.

Moreover, as the number of trials climbed, it became clear that two other forms of cooperation were critical: witness protection and enforcement of sentences. Witnesses who testify before the Tribunal

20. Judge Gabrielle Kirk McDonald, President of the ICTY, Address to the United Nations General Assembly (Nov. 8, 1999), available at <http://www.un.org/icty/latest/latestdev-e.htm>. The Expert Group appointed by the U.N. Secretary General in 1999 to review the operations of the ICTY and ICTR also advocated such a proposal. See *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, U.N. GAOR, 54th Sess., Agenda Items 142-43, ¶¶ 47-48, 108, U.N. Doc. A/54/634 (1999).

21. See *Current State of the International Tribunal for the Former Yugoslavia: Future Prospects and Reform Proposals, Report on the Operation of the International Tribunal for the Former Yugoslavia, Submitted by Judge Claude Jorda, President, on Behalf of the Judges of the Tribunal*, U.N. GAOR, 55th sess., Agenda Item 52, ¶ 35, U.N. Doc. A/55/382 (2000); see also Judge Claude Jorda, Report on the Operation of the International Criminal Tribunal for the Former Yugoslavia (May 12, 2000), available at <http://www.un.org/icty/pressreal/RAP000620e.htm>.

often put their lives in jeopardy by doing so. Although the Tribunal has significant protective measures for witnesses while they are at the Tribunal, it lacks a program that would extend that protection. Thus, witnesses who would be at risk if they returned to their home must be relocated to other states.

Further, state assistance is necessary with respect to enforcement of sentences because the Tribunal does not have a prison. Its detention unit serves only as a holding facility for those awaiting trial or appeal and is not equipped for long-term incarceration.

It was therefore imperative to secure state agreement to accept onto their territory witnesses at risk and convicted individuals who had exhausted their rights of appeal. After many months and much negotiating, we were able to reach agreement with several states to provide this assistance.²²

Another obligation of state cooperation is the execution of arrest warrants. This duty has been honored only in its breach by many states in the former Yugoslavia, most notably Serbia, Republika Srpska, and for some time, Croatia. In fact, Milosevic's Serbia not only refused to execute arrest warrants, it denied the Prosecutor access to Kosovo for several months and repeatedly failed to comply with the Tribunal's requests and orders. I wrote to the Security Council four times and appeared before it twice, urging action to address this noncompliance, asserting it had now risen to the level of obstructionism.²³

22. Italy, Finland, Sweden, Norway, Austria, France and Spain have signed agreements for the enforcement of sentences. Security concerns preclude providing information on states that have agreed to protect witnesses.

23. Letter from Judge Gabrielle Kirk McDonald, President of the ICTY, to His Excellency Mr. Hans Dahlgren, President of the Security Council (Sept. 8, 1998), *available at* <http://www.un.org/icty/pressreal/LET980908.htm>; Letter from Judge Gabrielle Kirk McDonald, President of the ICTY, to His Excellency Mr. Jeremy Greenstock, President of the Security Council (Oct. 22, 1998), *available at* <http://www.un.org/icty/pressreal/p356-e.htm>; Letter from Judge Gabrielle Kirk McDonald, President of the ICTY, to His Excellency, Ambassador A. Peter Burleigh, President of the Security Council (Nov. 6, 1998), *available at* <http://www.un.org/icty/pressreal/LET981106.htm>; Letter from Judge Gabrielle Kirk McDonald, President of the ICTY, to His Excellency Ambassador Qin Huasun, President of the Security Council (Mar. 16, 1999), *available at* <http://www.un.org/icty/pressreal/p386-e.htm>; Judge Gabrielle Kirk McDonald, President of the ICTY, Address to the Security Council (Oct. 2, 1998), *available at* <http://www.un.org/icty/pressreal/p349-e.htm>; Judge Gabrielle Kirk McDonald, President of the ICTY, Address to the Security Council (Dec. 8, 1998), *available at* <http://www.un.org/icty/pressreal/p371-e.htm>.

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lent of the ICTY, to His Council (Sept. 8, 1998), m; Letter from Judge Excellency Mr. Jeremy 22, 1998), *available at* Judge Gabrielle Kirk Ambassador A. Peter 6, 1998), *available at* m Judge Gabrielle Kirk mbassador Qin Huasun, 1999), *available at* ielle Kirk McDonald, Oct. 2, 1998), *available at* ielle Kirk McDonald, Dec. 8, 1998), *available at*

Four Security Council resolutions²⁴ reaffirmed the Prosecutor's right to enter Kosovo and investigate crimes committed there, but the Federal Republic of Yugoslavia continued to flout both the letter and the spirit of international law. I even raised this issue in my 1998 address to the U.N. General Assembly.²⁵ I wrote NATO and Contact Group members; I addressed the Peace Implementation Council that oversees the Dayton agreement,²⁶ all to no avail.

Thus, the carnage that erupted in Kosovo should not have come as a surprise given the international community's failure to see the writing on the wall. Further, the failure to insist upon the arrest of General Ratko Mladic and Radovan Karadzic, major figures in the conflict, created a culture of impunity and negated the deterrent effect. As a result, those bent on committing horrific atrocities were emboldened by this absence of accountability.

Allowing those charged with the commission of unspeakable atrocities to remain in official or unofficial positions of power and influence was an albatross around the neck of post-conflict recovery.

II. The Implications of the Work of the Tribunal

Nonetheless, there is no question but that the Tribunal now is making progress in fulfilling its mandate. The first step in achieving a lasting peace in the region is to identify alleged perpetrators of the worst abuses and hold them accountable. Included in the thirty-seven

24. S.C. Res. 1160, U.N. SCOR, 53d Sess., 3868th mtg., U.N. Doc. S/RES/1160 (1998); S.C. Res. 1199, U.N. SCOR, 53d Sess., 3930th mtg., U.N. Doc. S/RES/1199 (1998); S.C. Res. 1203, U.N. SCOR, 53d Sess., 3937th mtg., U.N. Doc. S/RES/1203 (1998); S.C. Res. 1207, U.N. SCOR, 53d Sess., 3944th mtg., U.N. Doc. S/RES/1207 (1998).

25. Judge Gabrielle Kirk McDonald, President of the ICTY, Address to the United Nations General Assembly (Nov. 19, 1998), *available at* <http://www.un.org/icty/pressreal/SPE981119.htm>.

26. On December 14, 1998, I wrote to the members of the Steering Board of the Peace Implementation Council overseeing the implementation of the Dayton Peace Agreement in Bosnia and Herzegovina, advising them of the Federal Republic of Yugoslavia's continuing non-compliance. Letter from Judge Gabrielle Kirk McDonald, President of the ICTY, to the Peace Implementation Council (Dec. 4, 1998), *available at* <http://www.un.org/icty/pressreal/p373-e.htm>. I also wrote to the Ministers of Foreign Affairs of the United Kingdom and France, on February 22, 1999, concerning the nature of provisions in the draft Rambouillet agreement pertaining to the Tribunal and stressing the need to bind the Federal Republic of Yugoslavia to specific forms of cooperation, such as the recognition of the competence of the Tribunal and the issuance of visas. Letter from Gabrielle Kirk McDonald, President of the ICTY, to Foreign Ministers Vedrine and Cook (Feb. 22, 1999), *available at* <http://www.un.org/icty/pressreal/p383-e.htm>.

persons currently in custody in The Hague are: Radovan Karadzic's deputy and the former Bosnian Serb member of the post-war national Presidency of Bosnia (Momcilo Krajisnik);²⁷ a major political representative for Bosnian Croats (Dario Kordic);²⁸ the generals allegedly responsible for organizing Serb military operations against Sarajevo and against Srebrenica (Stanislav Galic, Radislav Krstic);²⁹ the commanders of detention camps in north-western Bosnia,³⁰ and three men accused of controlling detention facilities and widespread sexual slavery and other torture in Foca.³¹ Fifteen persons have been tried in seven completed trials,³² four cases are on appeal,³³ four more

27. *See* Prosecutor v. Krajisnik, Amended Indictment, No. IT-00-39 (ICTY Feb. 21, 2000) (amended Mar. 21, 2000), available at <http://www.un.org/icty/indictment/english/kra-1ai000321e.htm>.

28. *See* Prosecutor v. Kordic, Amended Indictment, No. IT-95-14/2 (ICTY Nov. 10 1995) (amended Sept. 30, 1998), available at <http://www.un.org/icty/indictment/english/kor-1ai980930e.htm>.

29. *See* Prosecutor v. Galic, Indictment, No. IT-98-29 (ICTY Mar. 26, 1999), available at <http://www.un.org/icty/indictment/english/gal-ii990326e.htm>; Prosecutor v. Krstic, Indictment, No. IT-98-33 (ICTY Nov. 2, 1998) (amended Oct. 27, 1999), available at <http://www.un.org/icty/indictment/english/krs-ii981102e.htm>.

30. Miroslav Kvočka, Mladen Radic, Milojica Kos, Zoran Zigic and Dragoljub Prcac. *See* Prosecutor v. Kvočka, Amended Indictment, No. IT-98-30 (ICTY Nov. 9, 1998) (amended May 31, 1999), available at <http://www.un.org/icty/indictment/english/kvo-1ai981109e.htm>; Prosecutor v. Kvočka, Amended Indictment, No. IT-98-30/1 (ICTY Feb. 13, 1995) (amended Mar. 8, 2000 and Aug. 21, 2000), available at <http://www.un.org/icty/indictment/english/prc-ai000821e.htm>.

31. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic. *See* Prosecutor v. Kunarac, Amended Indictment, No. IT-96-23 (ICTY June 26, 1996) (amended July 13, 1998, Sept. 6, 1999, and Dec. 1, 1999), available at <http://www.un.org/icty/indictment/english/kun-3ai991201e.htm>; Prosecutor v. Vukovic, Amended Indictment, No. IT-96-23/1 (ICTY June 26, 1996) (amended Oct. 7, 1999 and Feb. 21, 2000), available at <http://www.un.org/icty/indictment/english/vuk-1ai000221-e.htm>.

32. Dusan Tadic (Prosecutor v. Tadic, No. IT-94-01); Zejnir Delalic, Hazim Delic, Zdravko Mucic and Esad Landzo (Prosecutor v. Delalic, No. IT-96-21); Zlatko Aleksovski (Prosecutor v. Aleksovski, No. IT-95-14/1); Anto Furundzija (Prosecutor v. Furundzija, No. IT-95-17/1); Goran Jelusic (Prosecutor v. Jelusic, No. IT-95-10); Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Vladimir Santic and Dragan Papic (Prosecutor v. Kupreskic, No. IT-95-16); Tihomir Blaskic (Prosecutor v. Blaskic, No. IT-95-14). *See* Fact Sheet on ICTY Proceedings, available at <http://www.un.org/icty/glance/procfact-e.htm> (Mar. 1, 2001) [hereinafter Fact Sheet].

33. Prosecutor v. Delalic, No. IT-96-21; Prosecutor v. Blaskic, No. IT-95-14; Prosecutor v. Jelusic, No. IT-95-10; Prosecutor v. Kupreskic, No. IT-95-16. *See* Fact Sheet, *supra* note 32. (On February 20, 2001, subsequent to the presentation of this paper, the Appeals Chamber affirmed the acquittal of Zejnir Delalic.)

Radovan Karadzic's the post-war national a major political rdic);²⁸ the generals y operations against c, Radislav Krstic);²⁹ western Bosnia;³⁰ and ities and widespread n persons have been 1 appeal,³³ four more

are ongoing³⁴ and nine are in the pre-trial stage.³⁵ Four individuals have exhausted appeals and are serving or have served their sentences,³⁶ while ten others are appealing theirs.³⁷ Two individuals have been acquitted and released.³⁸

However, the numbers seem small, especially by national standards. Has the Tribunal made a contribution that goes beyond conducting these trials? I believe that it has. The Tribunal has expanded the jurisprudence of international humanitarian law. Secondly, it has demonstrated that the rule of law is an integral part of the peace process. Third, the Tribunal has proved that international criminal justice is possible. Further, the Outreach Program, which I will discuss in a few minutes, offers an important mechanism to help the reconciliation process.

The Tribunal has considered several significant procedural and substantive issues. Perhaps one of the most challenging jurisdictional questions was when the Tribunal was called upon to consider its own competence to hear a challenge to its competence (it concluded that it could hear and rule on the challenge).³⁹ In many instances, the

No. IT-00-39 (ICTY Feb. 1999), available at [http://www.icty.org](#).

IT-95-14/2 (ICTY Nov. 1999), available at [http://www.icty.org](#).

(ICTY Mar. 26, 1999), [http://www.icty.org/90326e.htm](#); Prosecutor v. Krstic (amended Oct. 27, 1999), [http://www.icty.org/1102e.htm](#).

Prosecutor v. Dragoljub Zoric and Dragoljub IT-98-30 (ICTY Nov. 9, 1999), available at [http://www.icty.org](#); Prosecutor v. Kvočka, (amended Mar. 8, 2000) [http://www.icty.org/indictment/english/prc-](#)

Prosecutor v. Vukobratovic. See Prosecutor v. Vukobratovic (amended July 6, 1996) (amended July 6, 1999), available at [http://www.icty.org](#); Prosecutor v. Vukobratovic (amended Oct. 6, 1996) (amended Oct. 6, 1999), [http://www.icty.org/indictment/english/vuk-](#)

Prosecutor v. Zvezdanec, Zvezdanec, Hazim Delic, No. IT-96-21); Zlatko Furundzija (Prosecutor v. Furundzija, No. IT-95-10); Vukobratovic, Vladimir Vukobratovic, No. IT-95-16); Tihomir Blaskic (No. IT-95-16); and Tihomir Blaskic (No. IT-95-14). See Proceedings, available at [http://www.icty.org](#) (2001) [hereinafter Fact Sheet].

Blaskic, No. IT-95-14; Tihomir Blaskic, No. IT-95-16. See Fact Sheet, [http://www.icty.org](#) (2001) [hereinafter Fact Sheet].

34. Prosecutor v. Krstic, No. IT-98-33; Prosecutor v. Kordic, No. IT-95-14/2; Prosecutor v. Kvočka, No. IT-98-30/1; Prosecutor v. Kunarac, No. IT-96-23. See Fact Sheet, *supra* note 32. (On February 22, 2001, subsequent to the presentation of this paper, Trial Chamber II found Dragoljub Kunarac and Radomir Kovac guilty (No. IT-96-23). On February 26, 2001, Trial Chamber II found Dario Kordic and Mario Cerkez guilty (No. IT-95-14/2).)

35. Prosecutor v. Kolundzija, No. IT-95-8 (Dusko Sikirica, Dragan Kolundzija and Damir Dosen); Prosecutor v. Simic, No. IT-95-9 (Milan Simic, Miroslav Tadic, Simo Zaric and Stevan Todorovic); Prosecutor v. Krnojelac, No. IT-97-25; Prosecutor v. Galic, No. IT-98-29; Prosecutor v. Vasiljevic, No. IT-98-32; Prosecutor v. Martinovic, No. IT-98-32 (Vinko Martinovic and Mladen Naletilic); Prosecutor v. Brdjanin, No. IT-99-36 (Radislav Brdjanin and Momir Talic); Prosecutor v. Krajisnik, No. IT-00-39; Prosecutor v. Nikolic, No. IT-94-2. See Fact Sheet, *supra* note 32. (On October 30, 2000, subsequent to the presentation of this paper, the trial of Milorad Krnojelac (No. IT-97-25) commenced.)

36. Dusan Tadic (No. IT-94-1); Zlatko Aleksovski (No. IT-95-14/1); Dragan Erdemovic (No. IT-96-22); Anto Furundzija (No. IT-95-17/1). See Fact Sheet, *supra* note 32.

37. Hazim Delic, Zdravko Mucic and Esad Landzo (No. IT-96-21); Goran Jelusic (No. IT-95-10); Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic and Vladimir Santic (No. IT-95-16); and Tihomir Blaskic (No. IT-95-14). See Fact Sheet, *supra* note 32.

38. Dragan Papic (No. IT-95-16) was released on January 14, 2000; Zejnil Delalic (No. IT-96-21) was released pending appeal on November 16, 1998. See Fact Sheet, *supra* note 32. (On February 20, 2001, subsequent to the presentation of this paper, the Appeals Chamber affirmed Delalic's acquittal.)

39. See Prosecutor v. Tadic, Decision on Jurisdiction, *supra* note 9.

Tribunal's cases are made more challenging by the necessity of interpreting the language of international documents. In other cases, the Tribunal has been able to rely on the reasoning of decisions by other international judicial bodies, particularly with respect to detention and release of those awaiting trial or decisions on appeal. Hundreds of decisions have interpreted the Rules of Procedure. One of the more contentious matters was whether the Tribunal had the power to issue a subpoena to a state or state official for the production of documents. The Appeals Chamber held that it could issue compulsory orders but it was improper to call them subpoenas except when addressed to private persons.⁴⁰

Additionally, as trials have been conducted, the ICTY, along with the ICTR, has taken the important step of defining and classifying crimes of sexual violence. This is a significant advance in the international context. Indeed, this represents the first time that an international court has tried persons for rape, which unfortunately has long been part and parcel of armed conflicts.⁴¹ And this is the first time an international court has been given explicit jurisdiction of rape as a crime against humanity.⁴² Also important are the numerous decisions on the elements of the crimes of murder, willful killing, torture, persecution, inhuman and inhumane acts, and willfully causing great suffering.⁴³ Finally, the decisions on individual responsibility ensure that those who aid in the commission of a crime are held accountable as well as the primary perpetrator. These are only some of the decisions the Tribunal has considered; as more trials are completed, the jurisprudence will continue to evolve.

Secondly, the Security Council's choice of a court of law as the measure to help bring about and maintain peace is a victory for the rule of law, the anchor of civil society. In the Tribunal's early days, some thought that prosecution of alleged war criminals was

40. See *Prosecutor v. Blaskic*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, No. IT-95-14 (Appeals Chamber Oct. 29, 1997), ¶¶ 25, 46-56, available at <http://www.un.org/icty/blaskic/appeal/decision-e/71029JT3.html>.

41. See *Prosecutor v. Furundzija*, Judgement, No. IT-95-17/1 (ICTY Trial Chamber Dec. 10, 1998), ¶¶ 165-189, available at <http://www.un.org/icty/furundzija/trialc2/judgement/index.htm>; *Prosecutor v. Delalic*, Judgement, No. IT-96-21 (ICTY Trial Chamber Nov. 16, 1998), ¶¶ 475-496, available at <http://www.un.org/icty/celebici/trialc2/judgement/index.htm>.

42. ICTY Statute, *supra* note 6, art. 5(g).

43. See, e.g., *Prosecutor v. Tadic*, 112 I.L.R. 1 (ICTY 1997), available at <http://www.un.org/icty/tadic/trialc2/judgement/index.htm>.

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IT-95-17/1 (ICTY Trial
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inconsistent with efforts to bring peace to the region. Now, the goals of peace and international criminal justice are no longer seen as mutually exclusive. Rather, they are interdependent and complimentary.

Third, the Tribunal is now fully functioning, holding trials and appellate proceedings on a regular basis. Currently, there are over one thousand people from seventy-five countries involved in prosecuting and trying crimes committed across the region. International lawyers locate and interview witnesses and police and forensics experts exhume gravesites. A coalition of NATO forces from other states identify, track and detain persons indicted by the Tribunal and transfer them to the court hundreds of miles away in The Hague. Thus, the Tribunal has proved that, in practice, perpetrators of horrific crimes can be held accountable for their actions, and that it is possible to operate a system of *international* criminal justice. Efforts to establish a permanent International Criminal Court gained considerable momentum because of this lesson.

Finally, the importance of the Outreach Program cannot be overstated. Increasing the awareness of and combating the misinformation about the Tribunal was one of my priorities when I was elected President. Considering the Tribunal's extraordinary mandate, I felt that the Tribunal must take affirmative steps to make its processes and personalities known and understood, especially to the people in the former Yugoslavia. I must add, however, that apart from the formal Outreach Program, I also focused on the United States, where I found so many who neither understood—nor perhaps cared about—the Tribunal. Thus, I gave more interviews than I often cared to and spoke about the Tribunal as often as possible in various forums around the world.

Following much debate, an Outreach Program was finally established in September 1999.⁴⁴ The United States and the MacArthur Foundation responded to my personal appeal for funding and various European states contributed as well. The Program has a coordinator based in The Hague with offices in Croatia and Bosnia, through which there are regular contacts with the media and legal and other groups. To date it has organized weekly television updates on

44. See Lal C. Vohrah & Jon Cina, *The Outreach Programme*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD* 547 (Richard May et al. eds., 2000).

its activities, broadcasted its proceedings, and conducted regular conferences and exchanges of personnel and information between The Hague and the region. A major conference, which President Jorda will attend, is planned to take place shortly in Croatia.

This is only a first step that must be consolidated and expanded.⁴⁵ Unfortunately, the Outreach Program has only managed to secure funding until the end of this year. There are indications that the Program has so far had only limited success,⁴⁶ but I believe that it represents a vital aspect of the Tribunal's work and that it must be successful. Acknowledging the suffering of victims, vindicating the rights of communities and affirming individuals' equality are the cornerstones of the reconciliation process. Thus, the Tribunal's future depends on working in conjunction with broader initiatives, including, as the political climate becomes more conducive, the proposed truth and reconciliation commission for Bosnia.

Conclusion

The critical contribution of the Tribunal has been to foster and enhance the recognition by states of the need to enforce norms of international law prohibiting massive violations of human rights. Judicial mechanisms are now an established element of conflict resolution, and proposals under discussion around the world envision a range of international, national and mixed tribunals. Moreover, following the lead of the Tribunals, the culture of impunity is being challenged by states whose national courts are applying international law. The "Pinochet principle"⁴⁷ is demonstrating that justice has no

45. See Human Rights Center, University of California (Berkeley) & Centre For Human Rights, University Of Sarajevo, *Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors* (May 2000), available at <http://globetrotter.berkeley.edu:80/humanrights/documents>.

46. See Kristen Cibelli & Tamy Guberek, Education for Public Inquiry and International Citizenship, Tufts University, *Justice Unknown, Justice Unsatisfied? Bosnian NGOs Speak About the International Criminal Tribunal for the Former Yugoslavia* (2000), available at <http://www.epiic.com/class/justicereport.pdf>.

47. The arrest of Augusto Pinochet in the United Kingdom in October 1998 and subsequent decisions by the House of Lords established very important practical and juridical precedents. The case vindicated the principle that neither an individual's status nor any putative amnesty can act as a bar to accountability for acts that violate norms of international law. More recently, negotiations between the United Nations and the government of Sierra Leone over the establishment of a proposed "Special Court" to try the perpetrators of such acts have reaffirmed the latter. See *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. Doc. S/2000/915, ¶¶ 22-24, (Oct. 4, 2000), available at

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borders. For example, last month the Mexican police arrested a man alleged to have committed acts of torture and terrorism during the Argentinean junta twenty-five years ago.⁴⁸ Interestingly, the same judge who requested Pinochet's arrest and extradition from the United Kingdom issued the indictment.⁴⁹ Finally, the International Criminal Court would not be so close to reality—getting closer every day, with four ratifications in the last ten days⁵⁰—without the influence of both the ICTY and the ICTR. Both have been involved in the last four years of treaty negotiations and Preparatory Commission meetings.

Thus, the judgments of the Tribunal do more than determine the guilt or innocence of the accused. They do more than establish a historical record of what transpired. They do more than interpret international humanitarian law. Rather, the Tribunal's judgments are evidence of the actual *enforcement* of international norms. This is the best proof that the numerous conventions, protocols and resolutions affirming human dignity are more than promises. These paper tigers have been given sharp teeth, thus showing that the rule of law can help with the peace process.

It is clear, then, that we are living through tremendously encouraging times. Yet, how do we situate the progress of the past seven years in light of the amount of bloodshed that has flowed unchecked from Iraq to the former Yugoslavia to Somalia, through Rwanda, Afghanistan, Burundi, Liberia, Sierra Leone, Colombia, the Congo, Chechnya, Indonesia and Sudan? I believe that we are in the midst of a refocusing of the priorities of the international community. The ICTY and the ICTR have demonstrated that international criminal law is feasible. The resulting normative expansion has become an important component in framing policy options in response to humanitarian crises. In the wake of interventions in Kosovo and Sierra Leone, we are now seeing tentative efforts to extend these options from punishment to prevention.⁵¹ This is the

<http://www.un.org/Docs/sc/reports/2000/915e.pdf>.

48. See Tim Weiner & Ginger Thompson, *Wide Net in Argentine Torture Case*, N.Y. TIMES, Sept. 11, 2000, at A6.

49. See *id.*

50. Lesotho, Botswana, Luxembourg and New Zealand ratified the treaty September 6-8, 2000, at the U.N. Millenium Summit; Sierra Leone and Gabon ratified it on September 15 and 21, 2000, respectively. See Coalition for an International Criminal Court, *Rome Signature and Ratification Chart*, available at <http://www.igc.org/icc/rome/html/ratify.html> (last modified Feb. 8, 2001).

51. Tony Blair, Prime Minister of the United Kingdom, *The Challenge of Reform*

challenge we must all strive to meet.
Thank you.

for the U.N., Speech at the U.N. Millennium Summit, New York (Sept. 6, 2000),
available at <http://www.fco.gov.uk/news/speechtext.asp?4116>.